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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

PETTIBONE CORPORATION,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF AMICUS CURIAE ON BEHALF OF COUNCIL ON LABOR LAW EQUALITY IN SUPPORT OF PETITION FOR CERTIORARI

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INTEREST OF AMICUS CURIAE*

The Council on Labor Law Equality ("COLLE") is a national association of

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*Pursuant to Rule 36.2 of the Rules of this Court, written consents of the

large and small employers formed to monitor the activities of the National Labor Relations Board and other developments relating to the NLRA and to give support in those cases or on those issues which affect a broad section of industry. COLLE was formed in recognition of the necessity for a specialized and continuing business community effort to provide assistance in the review of NLRB and court decisions in order to maintain a balanced approach in the interpretation of national labor policy.

Pettibone's certiorari petition presents the Court with an opportunity to resolve one of the most vexing issues that confront employers. The conflict that existed in the circuits regarding "dual motive" discharges prior to the Board's decision in Wright Line, a Division of Wright Line, Inc., 251 N.L.R.B. 1083 (1980), has not abated. The decision of the court below is in direct conflict with the First Circuit's Wright Line

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parties to the filing of this brief have been obtained and have been lodged with the Clerk of the Court.

decision[1] on the question of whether the Board's General Counsel can establish a violation of Section 8(a)(3), the discriminatory discharge prohibition of the Act, without bearing the burden of proof. The decision below also conflicts with the view of several circuits that the General Counsel cannot establish an 8(a)(3) violation without proving that union animus was the dominant motive of the employer.

The Council On Labor Law Equality (COLLE) has filed amicus curiae briefs with the Court in support of the certiorari petition in Wright Line, A Division of Wright Line, Inc. v. NLRB, No. 81-987, cert. denied,(March 1, 1982), ___U.S. ___, and in Red Ball Motor Freight, Inc. v. NLRB, No. 81-1605, cert. denied, May 26, 1982, ___ U.S. ___. The continuing conflict and divergent views of the circuit courts is highlighted in the dissenting views of Justice White and Justice Rehnquist set forth in the dissent from the denial of the petition for certiorari in Red Ball Motor Freight, Inc. Because

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[1]Wright Line, a Division of Wright Line, Inc. v. NLRB, 662 F.2d 899 (1st Cir. 1981).

of the continuing importance of this issue and the need for the resolution of this conflict at this time, COLLE is for the third time during this term of court filing a brief amicus curiae urging the Court to accept the important questions presented in the instant case.

SUMMARY OF THE CASE

In view of the recent denial of review of a similar question by the Court in Red Ball Motor Freight, Inc., supra, the instant brief amicus curiae will concentrate exclusively upon those developments that were not covered in the amicus curiae brief filed by COLLE in Red Ball Motor Freight, Inc. This brief amicus curiae urging the Court to review the questions presented by Pettibone will incorporate by reference the amicus curiae brief filed by COLLE in Red Ball Motor Freight, Inc. and will attempt to limit its discussion to matters not previously presented therein. The instant brief will outline why the allocation of the burden of proof in NLRB unfair labor practice cases is ripe for review and suggest the need for a uniform burden of proof and related questions presented in Connick v.

Myers, No. 81-1251, cert. granted March 8, 1982, and will suggest the need for an appropriate accommodation between the Court's apparently divergent views on the question of the burden of proof as expressed in Mt. Healthy City Board of Education v. Doyle, 429 U.S. 274 (1977), and as contrasted to Texas Department of Community Affairs v. Burdine, 450 U.S. 240 (1981). The argument will explore why each of the aforementioned factors require that review be granted at this time.

I

REASONS FOR GRANTING THE WRIT

The NLRB's Wright Line Standard Shifting The Burden Of Proof Of Persuasion Upon Employers Is One Of The Most Important Questions Confronting Employers Upon Which The Courts Of Appeals Are Divided And Which Is Contrary To The Design Of The Statute

The petition by Pettibone is the third time in this term of court that the question of the appropriate burden of proof in unfair labor practice discrimination cases has come before this Court. In Wright Line, A Division of Wright Line, Inc. v. NLRB, 251 NLRB 1083, reversed in part, 662 F.2d 899 (1st Cir. 1981), cert denied , No. 81-987 (March 1, 1982), ___ U.S. ___, the question was

presented in the context of the overall importance of the issue and the failure of the First Circuit to follow the "dominant motive" test which had been the test followed by that circuit for many years. It was the position of Wright Line, as supported by COLLE, that the Board's newly adopted Wright Line doctrine in reliance upon the Court's Mt. Healthy decision, supra, was simply a recasting of the prior "in part" test. It continues to be the position of COLLE that the Board and its General Counsel continue to adhere to a standard that places the burden upon the employer to prove that no part of alleged discriminatory conduct is for a reason protected under Section 7 of the Act.[2]

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2 As COLLE has filed a brief amicus curiae with the Court in the Wright Line case and again in the Red Ball case, COLLE respectfully incorporates by reference its brief amicus curiae in support of the petition in Red Ball Motor Freight, Inc. v. NLRB, No. 81-1605, supra, as fully setting forth the reasons why the amicus curiae believes the issues presented in this case to be of paramount importance, in what respect the courts of appeal continue to remain divided on the proper test for employer motivation, and how the Board's Wright Line test endorsed by the Court of Appeals in Red Ball, supra, and by the Seventh Circuit in the instant case is in fact the reincarnation of the

In Wright Line, the opposition of the government suggested that the issue was not yet ripe for review as most of the courts of appeal were following the Board's Wright Line test. COLLE points out in its brief amicus curiae in Red Ball, incorporated herein by reference, that even those courts of appeal that have adopted the Board's Wright Line approach have not clearly recognized it to be a departure from the "in part" analysis that had previously been the Board's standard.

In Red Ball, the government again principally adopted the opposition it had prepared in Wright Line as the basis for its successful opposition to the granting of review. Red Ball was the first case in which the Court of Appeals had taken direct issue with the views of the First Circuit in Wright Line. Shortly before the consideration by the Court of whether or not to grant review in Red Ball, the Court was informed that the company had filed a petition under Chapter 11 of the

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discredited "in part" analysis. In order to conserve the Court's time, the arguments set forth in COLLE's amicus curiae brief in Red Ball will not be repeated in the instant brief.

Bankruptcy Act. The Court did not indicate whether this factor entered into its decision.

COLLE, which represents a cross-section of large and small employers throughout the United States, fully concurs in the dissenting views expressed by Justice White and Justice Rehnquist in their Memorandum in Red Ball Motor Freight v. NLRB, supra. The dissenting views of Mr. Justice White correctly articulate the division in the circuit courts on the question of whether or not it is the employer or the General Counsel that has the final burden of persuasion in an unfair labor practice case. One of the cases cited in that dissenting memorandum is a decision of the Seventh Circuit in Peavy Co. v. NLRB, 648 F.2d 460 (CA 7, 1981). The Seventh Circuit in the instant case relies upon its decision in Peavy as the correct evidentiary approach stating:

> Accordingly, Pettibone failed to show that the employees would not have been rehired in the absence of their protected conduct."
>
> Pet. App. A-3.

That single line from the decision of the Seventh Circuit in Pettibone demonstrates both the importance of the issue and the error of the court. It also demonstrates that the courts of appeals that have adopted the Board's Wright Line position sub silentio in fact not only as suggested by Justice White in his dissent have shifted to the employer the burden of persuasion but they have, in fact, shifted to the employer the burden of proving that the discharge was not "for cause." Such an analysis not only is in clear contradiction of the statutory design articulated by Congress in its Amendments to Section 10(c) of the Act, in which the Board is interdicted from issuing an order in which an individual is "discharged for cause" (see pp. 13 through 16 of COLLE Brief in Red Ball.) The House Labor Committee explained the amended section 10(c) by stating:

> ... "the Board may not 'infer' improper motive when the evidence shows cause for discipline or discharge."

H.R. Rep. No. 245, 80th Cong.,1st Sess., 42-43 (1947).

The above quoted passage from the Seventh Cricuit Opinion in Pettibone is clearly at

odds with that legislative history [3].

[3] Pettitioner Pettibone, in its petition in footnote 7, p. 5 of Petition for Certiorari, cites to the Court authority designed to remove a possible procedural barrier to the Court's reviewing the instant petition. The amicus curiae respectfully suggests that, while petitioner did not specifically ask the Court of Appeals to find the Board's Wright Line standard to be in error, that is not the same kind of procedural infirmity found by the Court in Woelke & Romero Framing, Inc., Pacific Northwest Chapter of the Associated Builders & Contractors, Inc., Oregon-Columbia Chapter, the Associated General Contractors of America, Inc., v. NLRB, U. S. Sup. Ct. Nos. 80-1798, 80-1808, and 81-91, ___ U.S. ___, decided May 24, 1982. In Woelke & Romero, the Court did not reach the question of whether picketing to obtain a subcontracting clause otherwise lawful was violative of Section 8(b)(4)(A) because that issue had not specifically been raised by Woelke & Romero before the Board. In the instant case, the Board had itself not yet recast its standard for burdens of proof at the time that the Pettibone case was issued. By arguing the merits of its position before the Seventh Circuit, it is respectfully suggested that Pettibone's petition does not fall within the same procedural infirmity recently articulated by the Court in Woelke & Romero. It is respectfully suggested that where the questions involved relate to burdens of proof and evidentiary standards, those questions should be deemed fairly subsumed within an argument on the merits and need not be specifically raised in order to be preserved for appellate review.

The holding of the Seventh Circuit in Pettibone also demonstrates the importance of the issue. It is far too easy for a reviewing court responsible for administering the substantial evidence test to be required to apply a standard in which it appears the employer must carry both the burden of proof as well as the burden of persuasion. Not only does the instant case demonstrate that the issue continues to be one that is constantly recurring but it also demonstrates the considerable difficulty that reviewing courts have in utilizing a standard that is not as clearly defined as that set forth by the Court in Texas Department of Community Affairs v. Burdine, 450 U.S. 240 (1981). Before suggesting to the Court the need for accomodation of the Burdine standard in discrimination cases and the NLRB's current Wright Line standard, it may be useful to briefly examine the facts in the instant case.

In Pettibone, the employees that were key punch operators engaged in protected activity in coming to their employer as a group and suggesting that they should

receive higher wages. The issue in this case, however, is not whether that conduct is an unfair labor practice. Rather, it was stipulated by the parties that all of the key punch operators in question quit their jobs (Pet. App. B-7). The issue of that is presented occurs when these same employees, a number of days later, changed their minds about their voluntary separation and sought re-employment. A discriminatory rehire case as opposed to a discriminatory discharge case is an area where the Board's General Counsel has usually been held to the higher burden of proof in demonstrating that the employer did not have cause for refusing to rehire the particular employees. The employees could have engaged in a strike, and that would have been protected conduct. The Board rules have generally held that conduct which is illegal in nature or other conduct unrelated to protected activity that occurs following the protected activity is a total defense to an employer's refusal to rehire employees. In Offner Electronics, Inc., 134 NLRB 1065 (1961), 49 LRRM 1307, the Board held that

an employer was not required to reinstate an employee who after engaging in protected activity and following her admitted discriminatory discharge engaged in "serious acts of misconduct", 134 NLRB 1064 at 1076, which included an attempt to steal certain confidential documents according to the views of the respondent employer. The Board held, in not ordering reinstatement:

> That she acted as she did at a time when she undoubtedly was upset and distraught is certainly grounds for sympathy on moral exhoneration but it is hardly grounds for requiring respondent to waive its objections to her reinstatement if it insisted upon them."

Offner Electronics, 134 NLRB 1064 at 1077.

Offner Electronics is still good law which has not been reversed by the Board. In Pettibone, the employees, like Mrs. Bojan in Offner, can be given moral sympathy in their concerted voluntary resignation from the firm but an employer should not be required to rehire employees who take it upon themselves to walk off their jobs and quit. The basis of the NLRB's decision which was affirmed by the court below was a requirement that the employer had not

sufficiently disproved that its rule of not rehiring persons who quit without notive was a recent fabrication because the employer could not prove that this rule had been broadly applied. This certainly is not the place to argue or re-argue the merits of the case. But it seems to the amicus curiae that this factual recitation demonstrates the importance in NLRB cases for a proper allocation of the burden of proof. Not only did Congress intend in 1947 to clearly place that burden upon the Board but a case such as the instant one demonstrates how arcane analysis in evidentiary standards not only totally frustrates the Congressional design but also is contrary to a common sense approach to the accommodation of activities for concerted action protected under Section 7 of the Act and the economic necessity of an employer to be able to run his business where the employer's actions are not based upon discriminatory conduct. Whatever discrimination Pettibone may have engaged in, in its verbal refusal to go along with the pay increase, clearly came to rest

when the employees quit and no amount of legerdemain should enable the Board or a reviewing court to require that an employer justify a business decision not to rehire employees that have once quit.

II

THE NLRB'S WRIGHT LINE STANDARD IS INCONSISTENT AND IN CONFLICT WITH THE DECISIONS OF THIS COURT

A. The NLRB Wright Line Standard Is An Improper Variation Of The Mt. Healthy Standard

In Wright Line v. NLRB, supra, the Board ostensibly backed away from the "in part" test and claimed to be adopting the test set down by this Court in Mt. Healthy Board of Education v. Doyle, supra. Under the Court's Mt. Healthy burden of proof standard, an employee who is the alleged discriminatee bears the burden of establishing a threshold showing that the conduct in question is protected and was a "...substantial or motivating factor in the actual discharge." 429 U.S. at 286. Mt. Healthy suggests that the appropriate standard in measuring the burden of proof should be the "dominant motive" test. A true Mt. Healthy test contemplates a

dominant motive analysis. See "Toward Rationality In Discrimination Discharge Cases, The Impact Of Mt. Healthy Board of Education v. Doyle Upon The NLRA," 66 Georgetown Law Journal 1109 (1978). William H. DuRoss, now Associate Solicitor, U. S. Department of Labor, analyzed this Court's Mt. Healthy decision in terms of the divergent views of the various circuit courts and correctly concluded that the ..."proper balance between the employer's ... right to exercise control over his work force and the employee's right to be protected from discrimination based on pro-union activity" ... is the "dominant motive" test as articulated by the Court in Mt. Healthy in the context of the First Amendment and as set forth by the First Circuit in NLRB v. Whitten Machine Works, 204 F.2d 883 (1st Cir. 1953), enforcing 100 NLRB 279, 66 Georgetown Law Journal 1109, 1110, 1111 and 1114. In Whitten Machine, the First Circuit placed the burden of proof in dual motive discharge cases upon the NLRB holding that an employee's discharge would violate the

Labor Act only when the protected activity ... "weighed more heavily on the decision to fire [the employee] -- than did the dissatisfaction with his performance ...", 204 F.2d 883 at 887. Mr. DuRoss, in his Law Review Article, aptly points out that the First Circuit ten years later in NLRB v. Lowell Sun Publishing, 320 F.2d 835, reversing in part 136 NLRB 206 (1967), held that in applying the "'dominant motive' standard ... the Board must prove that 'but for' pro-union activity, the employer would have considered the employee's misconduct grounds for discharge." 66 Georgetown Law Journal at 1111.

The best analysis of what the Board's Wright Line approach really is can be found in the 45th Annual Report of the NLRB for the year 1980, in which the Board places its Wright Line standard in perspective. See Exhibit A attached to this Brief. In this annual report, the Board refers to the Mt. Healthy test as requiring that:

> ... the General Counsel to make a prima facie showing sufficient to support the inference that an employee's protected

> conduct was a motivating factor in the employer's disciplinary action. Once this is established, the burden will then shift to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct.

See Exhibit A-1. The Board, thus, has shifted away from the "but for" analysis called for in Lowell Publishing and has shifted away from a strict following of Mt. Healthy by merely requiring that some evidence be estblished by the General Counsel from which an "inference" could be drawn that the proscribed conduct was a motivating factor. The "but for" test, rather than being placed upon the Board, is placed upon the employer. This is not a correct "dominant motive" test and not a correct Mt. Healthy standard. The Board's Annual Report acknowledges that its interpretation of Mt. Healthy does not include an adoption of the "dominant motive" test (see attached Exhibit A-3). The Board acknowledges in the Annual Report that:

> ... under the "dominant motive" test, the General Counsel not only has to establish a prima facie

> showing of unlawful motive but he is also required to rebut the employer's asserted defense by demonstrating that the discharge would not have taken place place in the absence of the employee's protected activities. Exhibit A-3 attached.

We respectfully suggest that the "dominant motive" test is the test that is consistent with the statutory design of the Labor Act rather than the Board's Mt. Healthy interpretation. We submit that the Board improperly relied upon Mt. Healthy as being consistent with NLRB v. Great Dane Trailer, Inc., 388 U.S. 26. The Board's 1980 Annual Report states:

> ... "the shifting burden process in Mt. Healthy was consistent with the process envisioned by Congress (and the Supreme Court's Decision in Great Dane. [See attached Exhibit A-3 & 4.]

We respectfully suggest, consistent with the views of Mr. DuRoss and his learned Law Review article, that in Great Dane the Court in fact removed the burden of proof from the NLRB only in a limited group of cases in which "the employer's discriminatory conduct could be inherently destructive." 66 Georgetown Law Journal 1109 at 1126.

B. The Tension Between Texas Dept. of Community Affairs v. Burdine And Mt. Healthy Should Also Be Resolved In NLRB Discrimination Cases

The Court has granted certiorari in Connick v. Myers, No. 81-1251, on March 8, 1982. In Connick v. Myers, the Court will decide the appropriate standard and burden of proof with regard to the dismissal of a public employee. The Petitioner in Connick correctly urges that there is need to resolve the conflict between Burdine and Mt. Healthy. Similarly, in the private sector, in matters involving the NLRA, the tension between Mt. Healthy and Burdine must be addressed. It is especially appropriate to review the instant case as a related case to Connick v. Myers as the NLRB in its Wright Line standard has relied upon the Court's Mt. Healthy decision. The amicus curiae respectfully suggests that Burdine more accurately reflects the appropriate burden of proof required under the National Labor Relations Act. In considering the tension between Mt. Healthy and Burdine, the Court will also have the opportunity of considering the appropriateness of the "dominant motive" standard as originally

enunciated by the First Circuit rather than the Board's current interpretation of Mt. Healthy.

The facts and holding of the Seventh Circuit in the instant case make Pettibone an ideal vehicle for accommodating NLRB dual motive discharge cases with the burden of proof that the Court will deem to be appropriate in the public sector in Connick v. Myers, supra.

CONCLUSION

For the reasons set forth in the instant brief amicus curiae and for the reasons set forth in the brief amicus curiae filed by COLLE with the Court in Red Ball Motor Freight, Inc. v. NLRB, No. 81-1605, the petition for certiorari in Pettibone should be granted.

Respectfully submitted,

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